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No. 90-494

In The

Supreme Court of the United States

October Term, 1990

BLUE CROSS AND BLUE SHIELD OF ALABAMA
and TRUCK RENTALS OF ALABAMA, INC.,

Petitioners,

vs.

FRED BROWN,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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December 5, 1990

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QUESTION PRESENTED

Whether the Eleventh Circuit created a new standard of judicial review in its decision in the case below.

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BRIEF IN OPPOSITION

Respondent, Fred Brown, respectfully submits that a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on April 25, 1990 should be denied.

STATEMENT OF THE CASE

Respondent hereby adopts the statement of the case as submitted by petitioners with the following exceptions:

1. At footnote number 3, page 7, Blue Cross asserts for the very first time what Blue Cross perceives as the two reasons for requiring pre-certification. Most insurance people would probably assert cost containment as the primary reason for requiring pre-certification. However, even accepting *both* of Blue Cross's self-serving reasons, neither reason would be applicable to the facts in the instant case. Blue Cross has never asserted that Brown's treatment was medically *un*necessary nor that the expenses were *un*reasonable. It is also undisputed that Brown would have incurred the expense without reference to pre-certification. There is no claim that the surgery performed on Brown could have been done on an outpatient basis. Blue Cross **CLAIMS** pre-certification was not obtained and the trial court labelled that claim as "undisputed," even though there is evidence in the record to the contrary.

2. On page 7, Blue Cross asserts that Blue Cross rejected Brown's claim for benefits after **EXTENSIVE** review of the medical records. The record reflects that Blue Cross reviewed **CERTAIN** medical records but ignored certain other medical records, although all were clearly in Blue Cross's file at the time of the denial of Brown's benefits.

3. On page 7, Blue Cross asserts that there was **NO EVIDENCE** of a medical emergency on the second admission. The trial court found " . . . there **IS** some evidence

that the second admission was also an emergency. . . . " Brown agrees with the trial court.

4. On page 9, Blue Cross completely misstates the Eleventh Circuit's application of *Firestone*. The petition states that the Eleventh Circuit's opinion " . . . imposes essentially *de novo* review with little or no deference to the decision of a plan fiduciary or administrator . . . if the fiduciary or administrator is operating under a potential conflict of interest." That statement attempts to combine the *de novo* review with the arbitrary and capricious standard. *Firestone* clearly states that conflict of interest can be used as one factor to be considered in determining whether Blue Cross was arbitrary and capricious. Petitioners infer it is the *only* factor. The *de novo* standard was not imposed by the Eleventh Circuit in the instant case because Blue Cross was given the very broad discretion with *Firestone* requires.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Decision Follows This Court's Decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

The Eleventh Circuit's opinion in the present case follows *Firestone*. Justice O'Connor, in *Firestone*, outlined the principles which would govern facts comparable to those in the case at bar including the conflict of interest which is present here. (At P. 956). In *Firestone*, the *de novo* review was applicable because the trustee had no discretion. In the case at bar, the "trustee" was given broad discretion and the Eleventh Circuit therefore rejected the

de novo review. However, the Eleventh Circuit condoned consideration of the conflict of interest as a factor to be considered. *Firestone* specifically authorized consideration of that factor, saying:

> "Of course, if the benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor[ ] in determining whether there is an abuse of discretion.' " (*Firestone*, at 956.)

Petitioners credit the Eleventh Circuit with imposing a *de novo* review without any citation to such a holding. A *de novo* trial is a new trial. As such, it does not inherently demand deference. The Eleventh Circuit specifically rejected a trial *de novo* (at p. 2421) and instructed the trial court to apply whatever deference is consistent with the built-in conflict of interest.

On pages 13-14 of its brief, Blue Cross asserts that the Eleventh Circuit has adopted a **NEW** standard of "no deference" when the trustee has a conflict of interest. This is incorrect. There is nothing new about a "no deference" standard if the conflict of interest is substantial. In *Van Boxel v. Journal Company Employees' Pension Trust*, 836 F.2d 1048 (7th Cir. 1987) the Court said that if there is a "serious conflict of interest, the proper deference to give their decisions may be slight, even zero" (at p. 1052). The Eleventh Circuit cited many cases which undertook to vary the deference consistent with the degree of conflict. *See, e.g., Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 895 (10th Cir. 1988); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1149 (4th Cir. 1985) sum aff'd. 447 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986); *Gilbert v.*

Burlington Indus., Inc., 765 F.2d 320, 328-29 (2nd Cir. 1985) sum aff'd., 447 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986); *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985); *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982); *Maggard v. O'Connell*, 671 F.2d 568, 571 (D.C. Cir. 1982); *see also Gesina v. General Elec. Co.*, 162 Ariz. 39, 780 P.2d 1380, 1383-85 (App.) (adopting variable deference in original opinion decided before *Firestone* and adhering thereto in post-*Firestone* opinion on reconsideration); *rev. denied*, 162 Ariz. 39, 780 P.2d 1380 (1989).

A. The Eleventh Circuit's Standard Affords the Same Deference to the Decisions of Blue Cross as does *Firestone*.

The Eleventh Circuit Standard is taken directly from *Firestone*. The Eleventh Circuit decision affords Blue Cross the exact amount of deference which Justice O'Connor set out. The only standard for the trial court in this case is the arbitrary and capricious standard.

There is no "two-step process" as claimed on page 14 of petitioner's brief. Nowhere does the lower court establish the first step of *de novo* review. On the contrary, the Court specifically instructed the trial court to apply the arbitrary and capricious standard (at p. 2409), but gave instructions to permit proof of a substantial built-in conflict of interest (at p. 2419).

B. The Eleventh Circuit's Standard Makes No Adjustment Whatsoever in the Standard of Review Agreed upon by the Parties in the Plan.

The *de novo* review has no application to the case at bar and the Eleventh Circuit could hardly have made that

point clearer. (At p. 2416). However, since Blue Cross is acting as trustee of its own money and determining what benefits will be paid from Blue Cross's money, the eleventh Circuit opinion simply permits the trial court to consider that substantial conflict of interest in deciding whether Blue Cross was arbitrary and capricious. Furthermore, the Eleventh Circuit was careful to reject the *de novo* review **BECAUSE** such a standard would deny Blue Cross the benefit of its bargain. (At p. 2415).

C. The Eleventh Circuit's Standard Makes No Distinction Between Plans Based upon Method of Funding Unless Specifically Authorized by the *Firestone* Decision.

Firestone specifically approved the Court's consideration of a conflict of interest as one of the factors in determining whether Blue Cross acted arbitrarily and capriciously. (At. p. 956). This is true whether the plan is funded or unfunded. (At p. 956). Such a teaching does not change the arbitrary and capricious standard, but simply gives the trial court a factor which it may consider. Blue Cross does not want the trial court to consider such a conflict of interest. Instead, Blue Cross chooses to label such considerations as "impermissible." (Brief, p. 16)

II. The Eleventh Circuit's Standards are Directly in Keeping with the Applicable Established Principles of Trust Law.

The "normal" definition of a trustee is one who looks after somebody else's money or property. (See *Ballentine's*

Law Dictionary, 3rd Ed., p. 1303). Established trust principles under those conditions dictate that the settlor can avoid litigation by permitting the trustee to determine benefits with finality. However, such a finality clause does not confer on the trustee *carte blanche* to make any payment that he chooses, be he prompted by whim, caprice, altruism or malice. *Hoffa v. Fitzsimmons*, 673 F.2d 1345 (D.C. Cir. 1982). In the instant case, Blue Cross is a "trustee" *only* because of the ERISA definition of trustee. Blue Cross is not charged with the responsibility of looking out for anybody's money except its own. Blue Cross is a trustee only in the sense that it collects the premiums and insures the plan. Such a trustee's decision should certainly be subjected to scrutiny. *Firestone* merely teaches that the Court should subject Blue Cross's decisions in this case to such scrutiny.

III. Further Review by this Court Would Serve Little or No Useful Purpose.

U.S. Supreme Court Rule 17, 28 U.S.C.A. lists the reasons this Court will consider a review on certiorari. The petitioners' *brief* addresses only one of those reasons. Petitioners claim that:

> "Fiduciaries, administrators, and reviewing courts require guidance from this Court with respect to the appropriate standard of review for actions under 29 U.S.C. §1132 where the plan grants a fiduciary discretionary authority to make claims determinations."

However, fiduciaries, administrators, and reviewing courts have already received adequate guidance from

Firestone. Since the Firestone decision, courts have consistently applied the *Firestone* holding. *Newell v. Prudential Insurance Co. of America*, 904 F.2d 644 (11th Cir. 1990); *DeNobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989); *Gonzales v. Prudential Insurance Co. of American*, 901 F.2d 446 (5th Cir. 1990); *Bali v. Blue Cross-Blue Shield Assoc.*, 873 F.2d 1043 (7th Cir. 1989); *Anderson v. Blue Cross-Blue Shield of Ala.*, 907 F.2d 1072 (11th Cir. 1990); *Gouras v. Burroughs Wellcome Co.*, ___ F.2d ___ (4th Cir. 1990) No. 90-553; *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990); *Baker v. Big Star Division of the Grand Union Company*, 893 F.2d 288 (11th Cir. 1990); *Deere & Co. v. Kennedy*, 548 N.E.2d 610 (111 App. Div. 1989) *cert. den.* 90-381 ___ U.S. ___; *Exbom v. Central States Southeast and Southwest Areas Health & Welfare Fund*, 900 F.2d 1138 (7th Cir. 1990); *Sokolowski v. Allied-Signal, Inc.*, 735 F.Supp. 163 (E.D. Pa. 1990); *Fair v. International Flavors & Fragrances, Inc.*, 905 F.2d 1114 (7th Cir. 1990); *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37 (11th Cir. 1989); *Retirement Fund Trust of Plumbing v. Franchise Tax*, 909 F.2d 1266 (9th Cir. 1990); *Belade v. ITT Corp.*, 909 F.2d 736 (2nd Cir. 1990); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990); *Cathey v. Dow Chemical Company Medical Care Program*, 907 F.2d 554 (5th Cir. 1990); *Johnson v. Enron Corp.*, 906 F.2d 1234 (8th Cir. 1990); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990); *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2nd Cir. 1990); *Jader v. Principal Mutual Life Insurance Co.*, 723 F.Supp. 1338 (D.Minn. 1989); *Jett v. Blue Cross & Blue Shield of Ala.*, 890 F.2d 1137 (11th Cir. 1989); *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 1541 (8th Cir. 1989); *Mine Workers, UMW v. Nobel*, 902 F.2d 1558 (3rd Cir. 1990); *PPG Industries Pension*

Plan A(C10) v. Crews, 902 F.2d 1148 (4th Cir. 1990); *Kunstenaar v. Connecticut General Life Insurance Co.*, 902 F.2d 181 (2nd Cir. 1990); *Rucco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232 (9th Cir. 1990); *Lea v. Republic Airlines*, 903 F.2d 624 (9th Cir. 1990); *Moon v. American Home Assurance*, 888 F.2d 86 (11th Cir. 1989).

The cases cited above, all of which are post-*Firestone*, indicate that there is no confusion and that the circuits are ably carrying out the standards set forth in *Firestone*.

Blue Cross seeks to convince this Court that there is confusion among the circuits. However, the only cases cited for that idea are *Lakey v. Remington, supra, DeNobel v. Vitro Corp., supra,* and *Exbom v. Central States Health & Welfare Fund, supra*. Petitioners assert that *Lakey* follows *Firestone*, while the Fourth Circuit in *DeNobel* does not. However, a careful reading of *DeNobel* reveals that Blue Cross simply *under*quoted the case.

Prior to *Firestone, all* ERISA cases were to be reviewed under the arbitrary and capricious standard. *Firestone* admittedly changed that standard if the fiduciary was not given the necessary discretions. In such cases, the *de novo* standard was adopted. When the Fourth Circuit said that the Supreme Court in *Bruch* "has mandated total abandonment of the 'arbitrary and capricious formulation . . . ' " the court was referring to specific circumstances. The *full* quote is that the Supreme Court "has mandated the abandonment of the arbitrary and capricious formulations **THAT GUIDED THE DISTRICT COURT IN THE PRESENT CASE.**" The Fourth Circuit then proceeded to determine whether the trial court *should* have adopted the *de novo* standard in that

case. The Fourth Circuit concluded that the plan's fiduciary *was* given broad discretion and, pursuant to *Firestone*, the trial court had properly applied the arbitrary and capricious standard as mandated by *Firestone*. In short, there is no conflict.

Blue Cross would like this Court to rule that under ERISA, "any" discretion is the same as "all" discretion. Petitioners seek to advance a standard which essentially gives them *carte blanche* to award or deny benefit claims under ERISA with no accountability for their motives and/or the consequences to the plan participants. Such a standard would unequivocally conflict with the intent of ERISA and would be exactly the throwback to pre-ERISA days so eloquently condemned by Justice O'Connor in *Firestone*. (At p. 956).

Petitioners contend (at p. 19) that "*Firestone* teaches trust law forms the basis for determining the appropriate standard of review . . . " under ERISA. *Firestone*, however, rejects the notion that trust law forms a basis -- it "guides." (At p. 954).

Finally, petitioners claim that Blue Cross, and others similarly situated, "will face a continued uncertainty as to the finality of their decisions in the administration of these plans, their ability to contractually (sic) provide for discretionary authority and review of an administrator's decision, and the extent to which courts may interpose their judgments in the place of the administrator or fiduciary." (At p. 28-29). Such "uncertainty" is only created when Blue Cross and others similarly situated, create a "substantial conflict of interest" in their programs.

CONCLUSION

For these reasons, the granting of a writ of certiorari would serve no useful purpose and should be denied.

Respectfully submitted,

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